IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 15615A/2011

Date: 26/6/2019

In the matter between:

ADV E BOTHA N.O. obo M G SIDIKANE **PLAINTIFF**

AND

THE ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

TOLMAY, J:

[1] The Plaintiff instituted action against the Road Accident Fund (RAF) for damages resulting from an accident that occurred on 31 December 2008. The parties agreed that merits and quantum be separated and the matter proceeded to trial on merits only. Due to the injuries sustained by the Plaintiff a *curator ad litem* was appointed, and duly substituted the Plaintiff in terms of Rule 15(1) and 28(1) of the Uniform Rules of Court.

[2] The first witness for the Plaintiff was Mr Samuel Sidikane, the brother of the Plaintiff, Mr Gift Sidikane. He testified that on 31 December 2008 he was sitting at a Spaza shop in Diepsloot, when he saw two BMW motor vehicles speeding down the street. According to him there were many

pedestrians walking on the gravel shoulder of the road. The one BMW tried to overtake the one in front of it on the right hand side. He then saw a person flying through the air. People gathered around the person, he went to take a look and it was only then that he realised that the person who was hit by the motor vehicle trying to overtake the other one, was his brother. He tried to talk to him and shook him to try and get a response, but to no avail, eventually an ambulance arrived and his brother was taken to the hospital. He wanted to speak to the driver of the motor vehicle, but he could not find him as he apparently drove away. Another person was also injured, but he didn't know him, and he only concentrated on his brother. He said that the place where the accident occurred is close to a school. He found his brother lying on the gravel shoulder of :1e road. He testified that many people usually walk on the gravel shoulder of the road where his brother was hit by the motor vehicle. A photograph of the road and surrounding area was shown to him. He said that, as can be seen on the photograph, that the road has one lane in each direction. The photograph also indicates gravel shoulders on both sides where pedestrians walk. Under cross-examination he denied that he said he was drinking, he was chatting with friends and saw his brother in a distance standing on the gravel shoulder. He denied that there were many motor vehicles, but said that there were many pedestrians in the area.

[3] It was put to him under cross-examination that his brother entered into the road to stop the insured driver, as he knew him, and as he approached the insured driver a cyclist approaching at a high speed from the opposite direction, hit his brother and because of the impact his brother and the cyclist collided with the insured driver's car. This witness said that he did not see a bicycle colliding with the car.

[4] Mr Sheperd Makwaledi then testified . He was standing on the side of the road as he just came out of a Spaza shop and was about to cross the road. He saw the Plaintiff standing on the gravel shoulder next to the road. Two white BMW's approached at high speed, it seemed as if they were racing. The one in the back tried to overtake the other one by driving onto the pavement. He collided with the Plaintiff and also with a cyclist that was

approeching from the opposite direction. The car which collided with the Plaintiff and the cyclist did not stop and sped off.

[5] It was put to him in cross-examination that the insured driver and his friend in the other BMW were driving at about 20 kmph as the road was very busy. He denied this and said that the vehicles were speeding and that the Plaintiff was standing next to the road when the BMW collided with him. The car also collided with the cyclist who was on the road driving in the opposite direction. He denied that the Plaintiff entered the road, carrying a beer in each hand.

[6] Mr Venancia Khuleka Ndluvo then testified. He also attested to an affidavit about the accident. He said that on the relevant day he was coming from the mall. He saw the Plaintiff standing on the pavement. He saw two vehicles approaching at high speed. The one tried to overtake the other and collided with the Plaintiff who was standing on the gravel shoulder of the road and the cyclist that was approaching from the opposite direction. The driver of the car who collided with the Plaintiff and cyclist did not stop at the scene pf the accident.

[7] It was put to him that the insured driver and the other vehicle was driving at 20 kmph and that Plaintiff entered the road with a two beers in his hand and tried to stop the insured driver. The cyclist then collided with Plaintiff resulting in both the Plaintiff and the cyclist colliding with the car.

[8] This was the case for the Plaintiff.

[9] The insured driver, Mr Phosa then testified. He said that on the day in question his friend, Piet said he should follow him in his car. On the way, approximately 500 meters from his home he came across the Plaintiff. Both he and his friend stopped. This contradicts what was put to the witnesses, namely that he was driving at a speed of 20 kmph. He said he stopped ± 6 metres behind his friend. At that stage the Plaintiff started walking onto the road, without looking whether it was safe, when he was in the middle of the road a cyclist coming from the opposite direction, at a high speed collided with the Plaintiff. Both the cyclist and the Plaintiff then collided with his car. He said the Plaintiff was drunk and had two beers in his hands. He said they then called the metro police, who was on the

scene in about 10 minutes and they then called an ambulance. He said that he was present at the scene and even talked to the metro police, who advised him to open a case against the cyclist. He however decided against it as the Plaintiff was his friend and the cyclist was not known to him. He said that the bicycle collided with the front right side of his car, while his vehicle was stationary in the left hand side of the car.

[10] Interestingly enough, despite his testimony that he talked to the metro police and gave them his version of events on the scene. His version of events is not contained in the accident report. The description contained in the report is the same version as the one given by all three witnesses who testified on behalf of Plaintiff.

[11] Initially he said that he could not have driven onto the pavement as his vehicle is very low. A photograph taken at the time of the accident was shown to him and indicated that this was not elevated pavement, what was referred to as a pavement was actually merely a gravel shoulder. When confronted with this Mr Phosa conceded that his car could indeed have driven onto it.

[12] Under cross-examination he changed his version on at least two occasions. He said, contrary to what was put to the witnesses by his counsel that the Plaintiff did not approach him, but rather his friend who was in the car in front of him. Later on he said that the Plaintiff walked between the two stationary cars. If this was so, it is inexplicable how the cyclist approaching from the opposite direction could have collided with Plaintiff, nor how Plaintiff could have been flying through the air as a result of the collision. It is also improbable that both vehicles would have come to a standstill if the road was as busy as alleged by Mr Phosa.

[13] The insured driver's version is improbable. The version as stated by the Plaintiff's witnesses was proved on a balance of probabilities. Mr Phosa was the sole cause of the accident and the RAF is liable for 100% of the damages suffered by the Plaintiff.

[14] Plaintiff was represented by two counsel, one of which is a senior counsel.

Defendant was of the view that costs of two counsel should not be awarded. I m of the view, that at this stage at least, the costs of two counsel is not justified, as the matter was not complicated and could easily have been dealt with by Plaintiff's senior counsel. The RAF is funded by the public and Court's should endeavour to save public funds.

[15] I make the following order:

1. The issues of merits and quantum are separated in terms of Rule 33(4) and the quantum claim is postponed *sine die;*

2. The Defendant is ordered to pay 100% of the Plaintiff's proven and/or agreed damages;

3. The Defendant shall pay Plaintiff's taxed or agreed party and party costs on the High Court scale, which will be limited to one senior counsel,

4. The amounts referred to paragraph 2 and 3 will be paid to the Plaintiff's Attorneys, Van Nlekerk Attorneys, by direct transfer into their trust account, details of which are the following:

NAME;	**Van Niekerk Attorneys**
BANK:	**First National Bank**
ACCOUNT NO:	**[….]**
BRANCH CODE:	**25-37-42**
REFERENCE:	**FN2404**

RG TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING:	**18 JUNE 2019**
DATE OF JUDGMENT:	**27 JUNE 2019**
ATTORNEY FOR PLAINTIFF:	**VAN NIEKERK ATTORNEYS INC**
ADVOCATE FOR PLAINTIF:	**ADV B GEACH (SC) et ADV W BOTHA**
ATTORNEY FOR DEFENDANT:	**PULE INC**
ADVOCATE FOR DEFENDANT:	**ADV J G VAN DEN BERG**